



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office 

DATE: October 1, 2014

SUBJECT: Comments on Draft AO 2014-14 (Trammell)
and Draft AO 2014-15 (Brat)

Attached are timely submitted comments received from Katie W. Payne, Esq. on behalf of Randolph-Macon College.

Attachment

WILLIAMS MULLEN

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October 1, 2014

Federal Election Commission
Office of General Counsel
999 East Street, N.W.
Washington, D.C. 20463

Dear Commissioners:

On behalf of Randolph-Macon College (the "College"), I am writing to submit public comment on draft advisory opinions 2014-14 and 2014-15.

As you know, David Brat and Jack Trammell (the "employees") are both employees of the College. Dr. Brat has been employed by the College since September 1, 1996, and is a full-time, tenured professor. Mr. Trammell has been employed by the College since October 17, 2000, and is the Director of Disability Support Services and an Associate Professor. In early June, both employees received nominations for the general election in Virginia's 7th Congressional District for the United States House of Representatives, to be held on November 4, 2014.

Upon their nominations, the College offered and both employees accepted a leave of absence beginning on August 8, 2014. They each entered a separate Memoranda of Understanding outlining their agreements with the College for the duration of their congressional campaigns. As a condition of this MOU, they agreed to seek an advisory opinion from the Federal Election Commission regarding the terms and conditions therein.

Among the terms of both MOUs are provisions for the continuation of benefits for which the employees were eligible prior to this leave of absence, including: pre-existing medical insurance; life insurance; tuition reduction, exchange and/or remission benefits; and disability insurance. The continuation of these benefits was dependent on their timely payment of all applicable employee contributions to maintain these plans. These benefits were being continued under a pre-existing policy by the College to cover fringe benefits during a leave of absence. This long-standing policy is generally applicable to all employees of the College, and not one which was created for this particular situation.

Pursuant to 2 U.S.C. § 437f(a)(1), each employee issued a request for an advisory opinion to ensure that the terms of this MOU are consistent with federal election laws and regulations. In response, both employees received the same two draft advisory opinions: one which stated that the MOUs' provisions concerning the College's payment of the employer portion of these fringe benefits during the employees' unpaid leave was consistent with the Federal Election Campaign Act and Commission regulations, and one coming to the opposite conclusion.

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The College strongly supports the former position (labeled as "Draft B"). Under 11 C.F.R. §113.1(g)(6), any compensation paid to a candidate is not considered a contribution if:

- (A) The compensation results from bona fide employment that is genuinely independent of the candidacy;
- (B) The compensation is exclusively in consideration of services provided by the employee as part of his employment; and
- (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

Id.

The compensation considered in the MOUs satisfies all three criteria, and thus should not be considered a contribution to the employee-candidates.

First, the benefits included in the MOUs are clearly the result of the employees' positions with the College, and are genuinely independent of their candidacy for federal office. The College routinely continues to pay the benefits for faculty members taking approved unpaid leaves of absence (sabbaticals, medical leave, etc.).

Second, the employees' compensation is exclusively in consideration for services provided for the College as part of their employment. As stated above, the continuation of these benefits during approved unpaid leave is a privilege accorded to those employees who have achieved faculty rank and who are governed by Faculty Handbook.

Finally, similar compensation is offered to similarly qualified employees of the College on unpaid leave for similar time periods, as evidenced by the Faculty Handbook, College policy and historical precedent. Section 11.1 of the Faculty Handbook describes all benefits granted to faculty members. It is attached in its entirety to this letter. Section 12.1.4 of the Faculty Handbook addresses leaves of absence:

Leaves of absence may be granted by the Provost for such reasons and for such duration as the Provost believes are in the best interests of the applicant and of the College. Recommendations on such leaves are made by the Committee on the Faculty.

The policy on leaves of absence is fairly broad and general for faculty members, as is typical for a small liberal arts college. Typically, the College uses the following procedures to determine whether a leave is granted:

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1. A faculty member seeking approved leave of absence would initiate a discussion with the Provost regarding leave requests. Topics addressed to determine appropriateness for approval purposes would include reason(s) for leave and length of requested leave.
2. Medical reasons, government or military service, and professional advancement (that also benefits the College and our students) are examples of appropriate reasons for approved leave.
3. If the Provost approves the leave request, the Provost, working with the Director of Human Resources, will make determinations regarding benefits continuation, payment of remaining salary due or salary continuance, and return to work details regarding the requesting faculty member.
4. If the leave request is approved, the Provost will generally approve the continuation of benefits.
5. These terms will be outlined and memorialized with the faculty member generally in writing, often via letter or in a Memorandum of Understanding.
6. The leave agreement governs the terms of the leave.
7. Faculty members on approved leave are required to pay their portion of insurance premiums in order to keep those benefits active.
8. Employees to return to work per the terms in the leave agreement.

Aside from meeting the three criteria outlined in 11 C.F.R. §113.1(g)(6), the compensation considered in the MOUs also satisfies the test the Federal Election Commission articulated in *Advisory Opinion 1992-03 (Reynolds Metal Company)* ("Reynolds"). In that opinion, the Commission considered three operative facts to determine whether compensation should be considered a contribution: 1) was there a "pre-existing policy to cover fringe benefits and unpaid leave which was generally applicable to all employees"; 2) was the period for providing these benefits relatively brief; and 3) could the extension of these benefits be viewed as compensation payable to the employee as part of other earned leave time. AO 1992-03 at 2.

Again, the compensation considered in the MOUs satisfies all three criteria listed in Reynolds, and thus should not be considered a contribution to the employee-candidates. As discussed above, the employees' benefits are being continued under a pre-existing policy by the College to cover fringe benefits during a leave of absence, which is generally applicable to all employees of the College, and not one which was created for this particular situation. Additionally, the employees will receive these benefits no later than January 1, 2015, which is a fixed and "relatively brief" period as also required in Reynolds. Finally, as full-time professors at the College, both employees are entitled to take a leave of absence by virtue of their position, provided it be in the best interest of the employee and the College. Faculty members, unlike employees in a corporate setting, are given wide latitude to take leaves of absence. The continuation of their benefits is indeed a form of conditional compensation for employees who garner faculty rank.

For these reasons, the College strongly supports the position outlined in Draft B of Advisory Opinions 2014-14 and 2014-15. We would be happy to provide any other information that would be helpful in your consideration of this matter.

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Regardless of the position taken by the Commission, it is unclear whether either of the draft advisory opinions addresses the issue of tuition reduction, exchange and/or remission benefits. These benefits are also covered by a pre-existing College policy, whereby employees of the College continue to receive tuition reduction, exchange and/or remission benefits for one semester following unpaid leave or termination from the College. Both of the candidate-employees are eligible for this benefit, and one of them currently takes advantage of it. As such, we respectfully request that the College be permitted to extend this benefit to the employees' children for the current semester, just as they would to any other employee who has taken unpaid leave or been terminated.

Sincerely,

A handwritten signature in black ink that reads "Katie Payne". The signature is written in a cursive, flowing style.

Katie W. Payne, Esq.

cc: Randolph-Macon College

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